

<b>Waterways Dev. Corp. v Town Bd. of Town of Brookhaven</b>
2008 NY Slip Op 31735(U)
March 18, 2008
Supreme Court, Suffolk County
Docket Number: 0028371/2006
Judge: Peter Fox Cohalan
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SUPREME COURT - STATE OF NEW YORK  
I.A.S. PART 24 - SUFFOLK COUNTY

**PRESENT:**

Hon. PETER FOX COHALAN  
Justice of the Supreme Court

MOTION DATE 4/23/07  
CAL. DATE 1/9/08  
Mot. Seq. # 001 - MD  
                  # 002 - MD CaseDisp

-----X  
WATERWAYS DEVELOPMENT :  
CORPORATION, :  
 :  
                                  : Plaintiff, :  
 :  
                                  : - against - :  
 :  
THE TOWN BOARD OF THE TOWN OF :  
BROOKHAVEN and THE TOWN OF :  
BROOKHAVEN, :  
 :  
                                  : Defendants. :  
-----X

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Upon the following papers numbered 1 to 51 read on this motion to dismiss the complaint; Notice of Motion/ Order to Show Cause and supporting papers 1 - 12; Notice of Cross-Motion and supporting papers 14 - 38; Answering Affidavits and supporting papers 39 - 45; Replying Affidavits and supporting papers     ; Other 13; 46 - 47; 48 - 49; 50 - 51; and after hearing counsel in support and opposed to the motion it is,

**ORDERED** that this motion (001) by the defendants the Town Board of the Town of Brookhaven and the Town of Brookhaven (hereinafter "Town") pursuant to CPLR 3212 for summary judgment dismissing the complaint is denied; and it is further

**ORDERED** that this cross-motion (002) by the plaintiff Waterways Development Corporation pursuant to CPLR 3212 for summary judgment in its favor is denied and the complaint of this action is dismissed.

Waterways Development Corporation (hereinafter "Waterways"), alleges it is the fee owner in possession of certain real property in Moriches, Town of Brookhaven, County of Suffolk, New York, known as The Waterways at Moriches. Waterways purchased the property in 1997 from Post Village Inc. which had acquired the property from Bay Pointe Associates (hereinafter "Bay Pointe")pursuant to a bankruptcy sale. On or about January 9, 1986,

Waterways' predecessor-in-interest, Bay Pointe applied for certain relief, including a height variance for the Midrise buildings (hereinafter "Midrise") in order to build three three-story Midrise buildings, one-half story greater than the allowable height of two and one-half stories which variance, it was alleged, was granted in 1986, after a public hearing. The site plan was approved on or about April 24, 1987.

The plaintiff alleges that pursuant to the approved site plan the overall project consisted of a total of 515 residential units, including 145 units comprised of three three-story Midrise buildings of 48 or 49 units each. Bay Pointe had commenced construction of the project and, by 1995, had completed construction of approximately 228 of the 515 units, along with associated improvements such as a sewage treatment plant, roads, curbs, ponds, and recreational facilities pursuant to the site plan. These improvements were to service the 228 units, as well as the future units developed at the property.

Waterways further alleges in its complaint that in or about December, 1996, the Town entered into stipulations in two actions, one in the United States Bankruptcy Court for the Eastern District of New York, and the other in Supreme Court of the State of New York (Suffolk County) wherein the Town acknowledged that the site plan of this property was still valid and binding and that the developer therein may "commence and/or continue" the construction without further planning board approval. The Court stipulation also acknowledged that the developer therein may "commence and/or continue" construction without further zoning board approval. Additionally, the complaint alleges that in September of 1997, Waterways obtained a letter from John Girandola (hereinafter "Girandola"), the Town's then Commissioner of Planning, Environment and Development, which confirmed the 1986 approval and authorized construction of additional units. Girandola allegedly also issued a letter in May, 1998, recognizing that under the stipulations "the site plan approval is still valid." Since May, 1998, Waterways has completed two out of three planned phases of the balance of the project and has constructed 118 residential units. The construction of the 145 units in the Midrise buildings comprises the third and final phase of the project.

Waterways also alleges in its complaint that in order to accommodate the concerns of the then Town Supervisor, John J. LaValle (hereinafter "LaValle"), and the area residents concerning the nature of the development, it entered into discussions with LaValle as to whether Waterways would forebear from commencing construction of the 145 Midrise units and instead build a total of 56 units that were less than three stories high. Waterways alleges that in exchange, LaValle represented that Waterways would be permitted to transfer 92 units to other property in Coram. In reliance upon such representations, Waterways refrained from commencing construction of the Midrise buildings, and instead applied to the Town for zoning approval for the transfer of the units to its Coram property. Waterways contends that despite the Town's prior representations and its reliance thereon, these representations were false and misleading and that the Town reneged on its promise to allow the transference of the Midrise units to the Coram property.

in addition, the complaint alleges that in early 2003, Waterways decided to proceed with the originally approved development of the Midrise buildings, but was informed by Edward Hennessey (hereinafter "Hennessey") the then Town Councilman, that the Town was not going to permit the construction of the Midrise buildings. Waterways states that, in or about March of 2003, it was also informed by the Town Attorney, Karen A. Wilutis (hereinafter "Wilutis"), that the Town would not permit such construction and that the Town had deemed the variance to have lapsed. Waterways alleges that Wilutis further contended that the Deputy Town Attorney who had signed the two Court stipulations had acted *ultra vires*. Subsequently, in or about May of 2003, Waterways and its attorney met with Wilutis and Daniel Gulizio (hereinafter "Gulizio") then of the Town's Department of Planning, Environment and Development, wherein Wilutis again stated the variance was invalid, and Giluzio stated that Waterways would not be allowed to proceed with construction.

The plaintiff has also pleaded in the instant action that it made application for three permits in March, 2001 to proceed with building the additional units, but those permits were denied by the Town Building Department on March 20, 2001.

The defendants now move to dismiss the complaint pursuant to CPLR 3212 and argue that Waterways is barred from bringing this action by the doctrine of res judicata and collateral estoppel, that the plaintiff's claims are not ripe for judicial review and that the plaintiff has failed to exhaust its administrative remedies. It is noted, however, that the Town has failed to comply with CPLR 3212(b) which provides that a motion for summary judgment must be accompanied by a copy of the pleadings and an affidavit from a person with knowledge. Although a search of the records reveals that the plaintiff provided a copy of the pleadings for the within action in its opposing papers, this does not remedy the failure of the town to submit an affidavit with the Town's moving papers. Thus the defendants' motion is therefore is deemed legally insufficient.

Accordingly, motion, (001) is denied.

The plaintiff opposes the defendants' motion and cross-moves for summary judgment and declaratory relief as follows: that Waterways has a valid right to the relief contained in the 1986 Midrise variance; that this variance is valid for the life of the project; that the two Court stipulations are valid and binding upon the Town and that Waterways may commence and/or continue construction on the property pursuant to the aforementioned site plan without any further Town zoning or planning board approvals; and that the Town Board and the Town's agencies, departments and boards shall not interfere with or otherwise deny Waterways a building permit based upon the absence of a height variance, as set forth above. Waterways argues that it exhausted its' administrative remedies, making this matter ripe for review.

Upon reviewing all the evidentiary materials submitted, it is determined by this Court that Waterways has not demonstrated entitlement to the declaratory relief requested as it has not exhausted its administrative remedies prior to seeking the within requested relief.

Waterways made application for permits for the three Midrise buildings in 2001, but did not follow through with the hearing on the appeal of said denial scheduled in June, 2001, and instead withdrew its appeal. Additionally, Waterways still has not sought final determination as to the validity of the denial of those permits, or of the plaintiff's right to build those residential units, and has not made application to the appropriate board for a determination as to the effectiveness of the previous variance.

Waterways had previously commenced an action seeking declaratory relief against members of the Town Board of the Town of Brookhaven and the Town of Brookhaven (Index No. 18000/2003). This Court, in its Order of November 12, 2004, ruled on that motion that until Waterways sought either a building permit or applied to the appropriate board for a determination as to the effectiveness of its 1986 variance, there was no final administrative action, and that until a decision was made on such applications, there was no direct or immediate effect on Waterways. The Court further determined that as there had been no final administrative action by the Town, there could be no claim that the Town had interfered with an alleged vested right or had refused to recognize the stipulations and failed to abide by their terms.

This Court's Order was affirmed by the Appellate Division of the Supreme Court, Second Judicial Department, in an Order, dated April 11, 2006. The Court found that the plaintiff had not shown that resorting to the administrative remedy of seeking a building permit would be futile, or that the plaintiff would likely receive an unbiased review from the Town. It further ruled that a justiciable controversy must involve a present, rather than hypothetical, contingent or remote, prejudice to the plaintiff, citing *American Ins. Assn. v Chu*, 64 NY2d 379, 383, *cert denied* 474 US 803. It also stated the dispute must be real, definite, substantial, and sufficiently matured so as to be ripe for judicial determination, citing *Bauer v Roman Catholic Diocese of Albany*, 91 AD2d 730, 457 NYS2d 1003 [3<sup>rd</sup> Dept 1982]; *Park Ave. Clinical Hosp. v Kramer*, 26 AD2d 613, 271 NYS2d 747 [4<sup>th</sup> Dept 1966], *aff'd* 19 NY2d 958; generally one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law, citing *Lehigh Portland Cement Co. v. New York State Dept. of Env'tl. Conservation*, 87 NY2d 136, 140, 638 NYS2d 388 [1995].

The Appellate Division of the Supreme Court, Second Judicial Department, also found there was no present prejudice to the plaintiff, that the plaintiff had not applied for a building permit for the residential units involving the variance at issue, that there had been no final determination as to the validity thereof or of the plaintiff's right to build those residential units, and that the only challenged actions were conversations with, and letters from, various Town officials, none of which have any final effect on the validity of the variance at issue and/or the issuance of a building permit allowing the construction of the units. Therefore, the dispute was not ripe for judicial review, and there was no justiciable controversy upon which the Court could properly render a declaratory judgment.

It is well settled that a court should decline to apply the discretionary relief of declaratory judgment to an administrative determination unless it arises in the context of a controversy ripe for judicial resolution (see, CPLR 3001; **Church of St. Paul & St. Andrew v Barwick**, 67 NY2d 510, 505 NYS2d 24 [1986]; **Cherry v Koch**, 126 AD2d 346, 514 NYS2d 30 [2<sup>nd</sup> Dept 1987]). "Ripeness pertains to the administrative action which produces the alleged harm to plaintiff; the focus of the inquiry is on the finality and effect of the challenged action and whether the harm from it might be prevented or cured by administrative means available to the plaintiff" (**Church of St. Paul & St. Andrew**, *supra*, at 521; see also, **Petosa v City of New York**, 135 AD2d 800, 522 NYS2d 904 [2<sup>nd</sup> Dept 1987]). In other words, the finality requirement is concerned with whether an official authorized to make the determination has arrived at a decision that inflicts injury (**Town of Orangetown v Magee**, 88 NY2d 41, 643 NYS2d 21 [1996])

In the instant action, although the plaintiff now sets forth that permits were applied for the three Midrise buildings in 2001, and denied because the height of these buildings exceeded two and one-half stories, the plaintiff has not followed through with the appeal of these denials. Nor has the plaintiff filed for a new variance concerning the height of the buildings, or filed for a determination as to whether the variance previously granted to its predecessor is still valid. Nor has the plaintiff demonstrated that to do so would be futile or that Waterways would likely receive a biased review from the Town. The only challenged actions the plaintiff has demonstrated are conversations with, and letters from, various Town officials none of which have any final effect on the validity of the variance at issue.

Accordingly, the plaintiff's cross-motion (002) for summary judgment is denied and the complaint of this action is dismissed.

Dated: March 18, 2008

  
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J.S.C.

FINAL DISPOSITION     NON-FINAL DISPOSITION